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Beyond Legalism: Towards a Thicker Understanding of Transitional Justice

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The field of transitional justice is increasingly characterized by the dominance of legalism to the detriment of both scholarship and practice. The first part of the paper examines what is meant by legalism and its consequences in the field through a number of overlapping themes: 'legalism as seduction', the 'triumph' of human rights, and the tendency towards 'seeing like a state'. The second part considers a number of correctives to such leanings which are analysed as encouraging legal humility, exploring the human rights as development axis, and finally developing a criminology of transitional justice. As law's place at the heart of transition from conflict is now secure, the time is right for a more honest appraisal of the limitations of legalism and a correspondingly greater willingness to countenance the role of other [non-legal] actors and forms of knowledge. 'Letting go of legalism' will both thicken the subject and deliver more effective change on the ground.

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INTRODUCTION

Transitional justice is a field on an upward trajectory. In a relatively short period, it has come to dominate debates on the intersection between democratization, human rights protections, and state-reconstruction after conflict. As well as its historical associations with the post-war tribunals in Nuremberg and Tokyo, and the democratization of previously authoritarian regimes in Latin America and the former Soviet Union, the term is now regularly deployed with regard to the Balkans, Rwanda, Sierra Leone, East Timor, and elsewhere.[1] A flurry of scholarly activity in recent years suggest its growing political and scholarly importance.[2] A distinguishable transitional justice template has emerged involving possible prosecutorial styles of justice (sometimes with bespoke international, hybrid or local institutions), local mechanisms for truth recovery, and a programme for criminal justice reform in previously conflicted societies. Transitional justice has emerged from its historically exceptionalist origins to become something which is normal, institutionalized and mainstreamed.[3]

This paper will argue that a key trend is already apparent in this relatively new field – the dominance of legalism.[4] This scholarly emphasis is also prevalent in the policy and practice of transitional justice. For example, international donors are funding what Brooks has described as an 'explosion in promotion of the rule of law' in local criminal justice systems in transition.[5] International criminal justice appears increasingly to have been

1 The rising profile and broadening gaze of transitional justice was confirmed by the publication of a report by the UN Secretary General in 2004, in which transitional justice is defined as:

> compris[ing] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.

See United Nations, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies* (2004) Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf>.

2 The scholarly literature on the topic is discussed throughout the paper.

3 R. Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights J.* 69–94.

4 Of course, sociologists, psychologists, anthropologists, criminologists, political scientists and others are producing thoughtful and insightful scholarship about transitional justice (see, for example, the work of Claire Moon, Brandon Hamber, Richard Wilson, Laura Piacentini, Tim Kelman) as well as others cited below in this article. However, one suspects that few of these scholars would dispute that law is the dominant discourse.

5 R. Brooks, 'The New Imperialism: Violence, Norms, and the "Rule Of Law"' (2003) 101 *Michigan Law Rev.* 2275–340.

'informally annexed' by international lawyers.[6] Focusing on both the local and international, this paper will argue that transitional justice has become overdominated by a narrow legalistic lens which impedes both scholarship and praxis. The dominance of legalism is seen in the outworking of a number of overlapping themes. These are grouped below as the notion of '*legalism as seduction*', the much vaunted '*triumph of human rights*', and the tendency for transitional justice legal scholars and practitioners towards '*seeing like a state*'. The second part of the paper suggests a range of practical and theoretical correctives to such tendencies. These are explored as *encouraging legal humility,* seeing *human rights as development* and, finally, developing a *criminology of transitional justice*. The paper concludes that law's place as the core framework around which transitions from conflict are constructed is now assured. Such a context should encourage a more honest acknowledgement of the limitations of legalism and a greater willingness to give space to other actors and forms of knowledge.

It might be helpful at this stage to offer some background to the paper by way of an honest declaration of interest and a short comment on terminology.

The paper is drawn from a number of scholarly and practical experiences over the last decade. In Northern Ireland, these have included involvement with a range of practical peacemaking projects. One such initiative involved efforts to supplant paramilitary punishment attacks with community restorative justice programmes. Partially staffed and led by former IRA and Loyalist combatants, these projects have faced considerable opposition from the state justice system and others concerning the 'ownership' of justice in the Northern Ireland transition.[7] In addition, my views have been shaped by involvement with a local human rights NGO (the Committee on the Administration of Justice, CAJ) and, more recently, a local truth recovery project (Healing Through Remembering).[8] Despite the fact that all these projects are heavily involved in transitional justice work at grass-roots level, few define it as such. When pressed on this, transitional justice for many of those who actually *do* it on the ground in Northern Ireland appears to be viewed as something which 'belongs to' others – chiefly lawyers, policy makers, and state officials.[9] This sense of 'disconnect' amongst grass-roots

6 P. Roberts and N. McMillan, 'For Criminology in International Criminal Justice' (2003) 1 *J. of International Criminal Justice* 315–38.

7 K. McEvoy and H. Mika, 'Restorative Justice and the Critique of Informalism in Northern Ireland' (2002) 43 *Brit. J. of Criminology* 534.

8 K. McEvoy, 'Beyond the Metaphor: Political Violence, Human Rights and "New" Peacemaking Criminology' (2003) 7 *Theoretical Crim.* 319; Healing Through Remembering, *Making Peace with the Past: Options for Truth Recovery in Northern Ireland* (2006).

9 For a classic discussion of this tension, see N. Christie, 'Conflicts As Property' (1977) 17 *Brit. J. of Crim.* 1–15. For a discussion on the nature of the Northern Ireland transition, see C. Campbell, F. Ní Aoláin, and C. Harvey, 'The Frontiers of

organizations was replicated in recent comparative fieldwork. In places like Sierra Leone and Rwanda, in particular, transitional justice appeared if anything even more distant, something rooted firmly in the formal mechanisms and institutions of international criminal justice rather than in the communities most affected by conflict.[10] In short, this paper is grounded in criminology and heavily influenced by the practice of these various grass-roots projects and the political contexts in which they operate.

With regard to terminology, it might also be useful at this juncture to include a brief comment on the notion of a 'thicker' understanding of transitional justice. The distinction in the social sciences generally between 'thick' and 'thin' theories is often viewed as intellectual short-hand for juxtaposing complex, multi-layered, and actor-orientated styles of scholarship with narrowly descriptive, unidimensional, instrumentalist or positivistic analysis.[11] Within legal scholarship, 'thin' writings on law tend to emphasize the formal or instrumental aspects of a legal system. They are inclined to assume the self-evident 'rightness' of the rule of law. While thin legal scholarship is not necessarily atheoretical, indeed, it may be so highly theorized as to be largely disconnected from the real lives of those affected by the legal system,[12] it is broadly less likely to reflect critically on the actions, motivations, consequences, philosophical assumptions or power relations which inform legal actors and shape legal institutions. A thicker understanding of transitional justice is therefore intended to counteract at least some of these tendencies.

I. TRANSITIONAL JUSTICE AND THE NOTION OF LEGALISM

In her classic 1963 account on the notion of legalism, Judith Shklar discusses the influence of legalism as a process which separates legal analysis from politics and from other social science disciplines.[13] She argued that many

Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *Modern Law Rev.* 317–45; C. Campbell and F. Ní Aoláin, 'Local Meets Global: Transitional Justice in Northern Ireland' (2003) 26 *Fordham J. of International Law* 871–92.

10 See K. McEvoy, H. Mika, and K. McConnachie, *Reconstructing Justice After Conflict: A Bottom Up Perspective* (2008, forthcoming).

11 See, generally, C. Geertz, *The Interpretation of Cultures* (1973); M. Coppedge, 'Thickening Thin Concepts and Theories: Combining Large-N and Small-N in Comparative Politics' (1999) 31 *Comparative Politics* 465–76; J. Newman, 'Through Thick and Thin?: The Problem of the "Social" in Societal Governance' (2004), available at <http://www.open.ac.uk/socialsciences>.

12 For an excellent discussion of these various distinctions, see R. Peerenboom, *China's Long March to the Rule of Law* (2002).

13 J. Shklar, *Legalism* (1963) 2:

> The urge to draw a clear line between law and non-law has led to the constructing of ever more refined and rigid systems of formal definition. This procedure has served to isolate law completely from the social context from which it exists. Law

lawyers find it difficult to view any social or political process free from 'legal habits or beliefs' and that they distrust arguments based on expediency, the public interests or 'the social good' – believing that such terms are '… dangerous and too easily used as cloaks for arbitrary actions'.[14] Of course legal academics, particularly those who work on jurisdictions which have experienced violent political conflict, are well aware of the often precarious attachment to legal standards.[15] Much contemporary legal scholarship takes the intersection between law, politics, and the social realm as a given.[16] From the legal realists of the 1930s, the critical legal studies of the 1970s, the pervasive influence of law and economics in the United States of America and the (arguable) dominance of socio-legal scholarship in the United Kingdom, at least since the 1990s, the interdisciplinary, small-'p' political and anti-positivist analysis of law, legal institutions, and legal actors has become a mainstay of most major law schools.[17] In such a context, the argument that transitional justice continues to be dominated by 'legalism' may seem somewhat anomalous.

In examining that apparent incongruity, I want to explore a number of overlapping variants of legalism within transitional justice discourses before suggesting how these might be addressed. Broadly, my argument is that a strongly positivistic trend of scholarship and practice persists in the legal understanding of transitional justice.[18] In part this may be understood as a by-product of the re-emergence and emboldening of international lawyers shaken free from the stasis of the Cold War.[19] It is also a consequence of significant resourcing at the national and international level evidenced by the *institutionalization* of transitional justice in major legal edifices such as the international tribunals for the former Yugoslavia and Rwanda, the International Criminal Court, and the other local and hybrid models. It is also,

> is endowed with its own discrete, integral history, its own science, and its own values, which are all treated as a single 'block' sealed off from general social history, from politics, from morality … This procedure has served its own ends very well ; it aims at preserving law from irrelevant considerations, but it has ended by fencing legal thinking off from contact with the rest of historical thought and experience.

14 id., p. 9.

15 See, for example, D. Dyzenhaus, *Legality and Legitimacy* (1997). F. Ní Aoláin and C. Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 *Human Rights Q.* 172–213.

16 See, generally, M. Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (2000).

17 See, generally, S. Roach Anleu, *Law and Social Change* (2000); I. Ward, *Introduction to Critical Legal Theory* (2004, 2nd edn.). F. Cownie, *Legal Academics: Cultures and Identities* (2004).

18 For a discussion of the philosophical underpinnings of this style of legal analysis, see M. Kramer, *In Defense of Positivism: Law Without the Trimmings* (1999).

19 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Rev.* 1–30.

perhaps, precisely because transitions from conflict shine a harsh light on the political and contingent nature of legality that legal formalism becomes the defensive default position for many lawyers working in this field.

LEGALISM AS SEDUCTION

The pervasive influence of law in the social and political lives of 'stable' or 'settled' societies is well rehearsed.[20] What Bourdieu has discussed as 'the force of law' well captures the dominance of law in contemporary industrialized societies.[21] Bourdieu refers to the magnetic, almost mysterious 'pull' of law wherein large swathes of social, political, and intellectual life are heavily influenced by the legal world or 'juridical field' as he refers to it. Law not only regulates behaviour, it shapes our political relations, our language, even the way we think.[22] In part, other spheres are amenable to law's influence because, as Clifford Geertz has argued, law represents a way of conceptualizing and articulating how we would like the social world to be. It encourages a notion of a rational and ordered place based on universal understandings, it enables people 'to imagine principled lives they can practicably lead'.[23]

For some, the socially privileged status of judges and lawyers, their monopoly on the delivery of legal services, and the resultant sense of professional self-confidence all combine to encourage the dominance of legalism.[24] For others, the advancement of law as a particular subset of 'scientific knowledge', or what de Sousa Santos has termed 'creeping legalism', is bound up with the development of the modern capitalist state and, in particular, the need of the state to replicate other 'understandable' systems of thought beneath and beyond the state.[25] In more recent times, legal theorists discuss a new 'international legalism' wherein law's centrality to globalization in general and international politics in particular has far outstripped its historic limitations associated with the notion of state sovereignty.[26]

20 See, for example, M. Weber, *Economy and Society: An Outline of Intepretative Sociology* (1978).

21 See J.R. Terdiman, translator's introduction to P. Bordieu, 'The Force of Law: Towards a Sociology of the Juridical Field' (1987) 38 *Hastings Law J.* 805–53.

22 P. Ewick and S. Silbey, *The Common Place of Law: Stories from Everyday Life* (1998).

23 C. Geertz, *Local Knowledge: Further Essays in Interpretive Sociology* (1983) at 234. See, also, S. Roberts, 'After Government?: On Representing Law Without the State' (2005) 68 *Modern Law Rev.* 1–24.

24 For example, T. Halliday, *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (1987).

25 B. de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (2002) 55–61.

26 See R. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics (2002) 35 *Cornell International Law J.* 355–87, at 365. See, also, R. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (2000).

For current purposes it is sufficient to note that the seductive qualities of legalistic analysis lend themselves particularly well to transitional contexts. Claims that the 'rule of law' speaks to values and working practices such as justice, objectivity, certainty, uniformity, universality, rationality, and so on are particularly prized in times of profound social and political transition.[27] Often in such societies, it is either the absence of the rule of law or the distortion of forms of legality which are the defining characteristics of the previous regime.[28] Legal formations which emerge during a transition from conflict such as new constitutions, local, international or hybrid prosecutorial forums or even truth recovery mechanisms are inevitably infused with legalistic discourse. In such a context, law becomes an important practical and symbolic break with the past, an effort to *publicly* demonstrate a new-found legitimacy and accountability.[29] In some such circumstances, the signing up to and implementing of international human rights agreements are integral to seeking international respectability. A professed respect for the rule of law demonstrates a 'fitness of purpose' for countries to take a proper place amongst the community of nations, or even the recovery of a sense of national self-confidence and pride.[30]

As is discussed below, this description of legalism as 'seductive' is not to denigrate the importance of law and legal analysis in the process of transition. Rather it is to suggest that legalism tends to foreclose questions from other complementary disciplines and perspectives which transitional lawyers should be both *asking* and *asked*. It is perhaps understandable that many lawyers who practice international criminal law tend not to overly analyse fundamental existential questions such as 'what is transitional justice for?' or 'whom does it serve?'. Similarly, although it is perhaps less excusable, many legal scholars of transitional justice appear to spend most energy in the formidable task of analysing the expanding case law and relevant international standards without addressing these larger questions. There is a comfort in staying within what organizational theorists refer to as a 'closed system' of thinking.[31] However, as I will suggest below, there are useful frameworks of analysis that can enrich and inform legal thinking and develop ways of avoiding some of the more negative consequences of law's seductive qualities.

27 S. Ratner, 'New Democracies: Old Atrocities' (1999) 87 *Georgetown Law J.* 707–48.
28 See R. Teitel, *Transitional Justice* (2000); S. Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).
29 See, for example, M. Osiel, *Mass Atrocity, Collective Memory and the Law* (1999).
30 See, for example, L. Piacentini, *Surviving Russian Prisons: Punishment, Economy and Politics in Transition* (2004).
31 J. Thompson, *Organizations in Action: Social Science Bases of Administrative Theory* (2003).

As is discussed extensively elsewhere, human rights talk has become the new 'lingua franca' of global moral thought.[32] As Douzinas has argued, the 'triumph' of human rights has united '... left and right, the pulpit and the state, the ministers and the rebel, the developing world and the liberals of Hampstead and Manhattan.'[33] Human rights are attributed the capacity to deliver 'a set of values for a Godless age'.[34] In tandem with that rise in prominence, human rights discourses have been subject to increasingly rigorous critical scrutiny. At a philosophical level, some commentators such as Douzinas remain highly sceptical as to the intellectual rigour with which human rights advocates press their claims.[35] More grounded critiques point to universalist versus cultural relativism debate within human rights.[36] For some, there are perceived Western and imperialist tendencies in elements of human rights talk. Baxi has described this (in its crudest form) as the 'westoxification' critique, a view of the West as imposing standards of rights and justice which it has always violated in the developing world and amongst Islamic societies in particular.[37] Human rights institutions such as human rights commissions have also been criticized for their failure to document properly past abuses and some new human rights imbued constitutions have also been critiqued for their failure to address socio-economic rights in a meaningful fashion.[38] The pre-eminence of civil and political rights in particular is also viewed in some quarters as acquiescence in the neo-liberal economic order and an abandonment of some of the more traditional social justice concerns such as poverty and health.[39]

Some of these criticisms are framed as the logical result of the legalistic bent of contemporary human rights discourses. Thus, for example, Michael Ignatieff and David Kennedy have both criticized human rights talk as deliberately denying the quintessentially *political* nature of its argumentation and for obfuscating the reality of conflicting rights.[40] In some contexts, the realities of confusion, 'messiness', and tough choices that characterize the lives of many (including human rights activists themselves) is translated

32 M. Ignatieff, *Human Rights as Politics and Idolatry* (2001) 53.
33 C. Douzinas, *The End of Human Rights* (2000) 1.
34 See, generally, F. Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000).
35 Douzinas, op. cit., n. 33.
36 C. Norris, *Reclaiming Truth: Contribution to a Critique of Cultural Relativism* (1996).
37 U. Baxi, *The Future of Human Rights* (2002) 111–12.
38 See, generally, M. Mandami (ed.), *Beyond Rights Talk and Culture Talk* (2000) and P. Jones and K. Stokke (eds.), *Democratising Development: The Politics of Socio-economic Rights in South Africa* (2005).
39 A. Woodiwiss, *Making Human Rights Work Globally* (2003).
40 Ignatieff, op. cit., n. 32, at p. 20, and D. Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights J.* 116.

through rights discourses into the legalese of international standards, legal certainties, and political objectivity.[41] This process 'thins out' the complexities of life in conflicted societies and positivizes the norms which underpin such challenges in international conventions and tribunals, national constitutions, and the domestic courts.[42] In the process, divorced from serious consideration of the wider political, social or cultural contexts which produced violence in the first place, the potential power of human rights institutions to prevent future violence is correspondingly reduced.[43]

A further related element of the pre-eminence of human rights discourses in transitional justice is a variant of what Stan Cohen has referred to as 'magical legalism'. Cohen uses the term in a very specific fashion to describe a technique of denial practiced by governments which seek to 'prove' that an allegation of malfeasance cannot possibly be true because that action is illegal. A government will list the numerous domestic laws and precedents, ratifications of various international conventions, appeals and discipline procedures and, as Cohen argues:

> then comes the magic syllogism: torture is strictly forbidden in our country; we have ratified the Convention Against Torture: therefore what we are doing cannot be torture.[44]

The 'triumph' of human rights is turned on its head and becomes an additional weapon in the state's armoury which is deployed to deny the very human rights abuses which the laws were intended to prevent. More broadly, the notion of magical legalism speaks directly to the disconnect between the 'real world' in some transitional societies and the plethora of 'law talk' which often characterize debates amongst the political elites. For example, Michael Taussig's treatment of 'law in a lawless land' concerning Colombia's contested 'transition' captures well the inverse relationship between Colombia's layers of laws upon laws, including ratifications of international human rights standards, and the lived reality of violence, corruption, and impunity experienced by so many ordinary Colombians.[45]

41 See, for example, E. Felner, *Human Rights Leaders in Conflict Zones: A Case Study of the Politics of 'Moral Entrepreneurs'* (2004), available at <http://www.ksg.harvard.edu/cchrp/pdf/Felner.2004.pdf>.

42 R. Wilson, 'Is the Legalisation of Human Rights Really the Problem: Genocide in the Guatemalan Historical Clarification Commission' in *The Legalisation of Human Rights: Multi-Disciplinary Perspectives on Human Rights and Human Rights Law*, eds. S. Meckled-García and B. Çali (2006) 81.

43 Wilson, id.

44 S. Cohen, *States of Denial: Knowing About Atrocities and Suffering* (2002) 108.

45 M. Taussig, *Law in a Lawless Land* (2003). This disconnect is referred to in Colombia as 'Santanderismo'. Santander, known as the 'lawgiver', fought beside Simon Bolivar in the Colombian War of Independence and became president of the then New Granada in 1833. A quotation from him – 'guns have given you independence, laws will give you freedom' – is inscribed over the entrance to Colombia's Supreme Court. I am indebted to Prof. Rodrigo Uprimny, former Judge

In the Northern Ireland transition too, quintessentially political positions were masked in the technical legalese of 'human rights concerns' at various junctures by British government negotiators only to be summarily abandoned when the political winds shifted.[46] At one level, the fact that law and legal arenas become a key contested site in the inevitable struggle for political advantage of a transition is hardly noteworthy. What is arguably of more importance is that the triumph of human rights makes it a particularly powerful variant of magical legalism which can appear above the political fray. However, as Cohen has argued, the plausibility of that position is only possible if common sense is suspended. For some (particularly lawyers), the allure of complex legal argumentation makes such a suspension all too viable.

A final important criticism advanced in terms of the legalization of human rights is that in some transitional societies human rights concerns become a byword for a retributive notion of justice. Often human rights standards are framed as the key bulwark against political calls for forgiveness and 'reconciliation'. For example, the post-communist transitions of Eastern Europe largely eschewed prosecutions in favour of releasing intelligence files and purging former 'collaborators' from public office. For some commentators, this absence of retributive justice has been described as a failure to live up to legal obligations which could in turn sow the seeds of future violence.[47] Similarly, the possibility that *accountability* might be achieved through the operation of institutions such as truth and reconciliation commissions or local amnesties and thus not trigger prosecutions by the International Criminal Court produced considerable discomfort amongst some of the lawyers involved in drafting the Rome Statute.[48] In an

of the Colombian Constitutional Court for his impeccable guidance on the nuances of this aspect of Colombian legal and political culture.

46 For example, one argument which was put forward by senior prison officials in Northern Ireland in the wake of the paramilitary cease-fires was that releases of politically motivated prisoners would discriminate against 'ordinary decent criminals'. The author and others spent considerable time contesting the legal validity of that position. Years later, after all qualifying political prisoners had been released within two years of the Good Friday Agreement, one senior official candidly acknowledged: 'You took all that human rights discussion far too seriously, of course it was just a negotiating position.' See K. McEvoy, *Paramilitary Imprisonment in Northern Ireland* (2001) especially ch. 11.

47 J. Borneman, *Settling Accounts: Violence, Justice and Accountability in Post-socialist Europe* (1997). Richard Wilson makes a similar criticism concerning the de facto absence of retributive justice in the South African truth and reconciliation process. See R. Wilson, *The Politics of Truth and Reconciliation in South Africa* (2001).

48 See D. Newman, 'The Rome Statute, Some Reservations Concerning Amnesties and a Distributive Problem' (2005) 20 *Am. University International Law Rev.* 293–357; W. Schabas, *An Introduction to the International Criminal Court* (2004). Schabas does note, however, at p. 87, that:

> . . . it has been suggested that genuine but non-judicial efforts at accountability that fall short of criminal prosecution would have the practical effect of convincing the Prosecutor to set priorities elsewhere.

environment where politically constructed notions of 'pragmatism' and related offshoots such as reconciliation are often viewed as slippery bywords for impunity, 'human rights as retribution' provides an understandably comforting terra firma for many lawyers.

To recapitulate therefore, a crude characterization of human rights in contemporary transitional justice discourses would suggest that human rights talk lends itself to a 'Western-centric' and top-down focus; it self-presents (at least) as apolitical; it includes a capacity to disconnect from the real political and social world of transition through a process of 'magical legalism'; and finally it suggests a predominant focus upon retribution as the primary mechanism to achieve accountability.

LEGALISM AND 'SEEING LIKE A STATE'

A final variant of legalism which is discernible in this field is a tendency towards an understanding of transitional justice that is both state-centric and 'top down'. The growth of transitional justice has seen an *institutionalization* of transitional justice into expensive supra-state and 'state-like' structures.[49] For example, at the level above the state, the temporary ad hoc tribunals to deal with the crimes committed in Yugoslavia and Rwanda have now been in operation since 1993 and 1997 respectively.[50] The permanent International Criminal Court came into force in 2002 and began work in earnest in 2004.[51] At the national level, hybrid tribunals in locations such as Sierra Leone, East Timor, and Cambodia have emerged which combine the efforts of local and international legal actors. Such developments have been matched by a plethora of other institutions which drive transitional justice at the national level, including truth and reconciliation commissions, reparations bodies, special trials of previous abusers, and a range of other initiatives.[52]

49 See R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia* (2004); L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (2005).

50 Under pressure from the United Nations and elsewhere, the ICTY and the ICTR have attempted to speed up their legal processes through their respective completion strategies. In the most recent update on progress on the ICTY, the President of the Court, Fausto Pocar, confirmed that trials will continue into 2009 at least. The ICTR estimates that by the end of 2008 the trials of 65-70 persons will have been completed. See ICTY, *Assessment and Report of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Council Resolution 1534 (2004*) (May 2006) and ICTR, *Completion Strategy of the International Criminal Tribunal for Rwanda* (May 2006) S 2006/358.

51 See, generally, Schabas, op. cit., n. 48.

52 See, generally, P. Hayner, *Unspeakable Truths:Facing The Challenge Of Truth Commissions* (2002) and P. De Greiff (ed.), *A Handbook on Reparations* (2006).

In addition to these exceptional measures, huge energies have been invested in the state justice reconstruction programmes of the 'normal' criminal justice systems through 'rule of law' programmes designed to secure a fairer and more efficient delivery of justice.[53] The label of 'failed state' in places like Somalia or Liberia is often used as a catch-all phrase to describe Hobbesian violence and anarchy.[54] In effect, the absence of functioning centralized state institutions becomes a byword for lawlessness. The converse is also true in some contexts. The reassertion of the authority of the state is often viewed as paramount in the transition from conflict and respect for 'the rule of law' is frequently seen as the benchmark for such authority. Thus the reconstruction or, in some instances, construction of institutions designed to deliver justice is core transitional business.[55] Judicial and legal reform, the disbandment or reshaping of police forces associated with previous regime abuses, sporadic attention to often deplorable prison conditions, mainstreaming of human rights training throughout different agencies: these and other state-centred initiatives have become familiar and perfectly understandable elements of the transitional 'justice reconstruction' template. They are all evidence of an apparent faith in the capacity of state institutions to meet the aims associated with transitional justice.

At a conceptual level, the development of such institutions speak to the tendency of a lawyer-dominated field towards what the anthropologist James C. Scott has referred to as 'seeing like a state'.[56] Scott's contention is that governments, in particular those that are seeking to achieve complicated and ambitious ends, need to render them 'legible' in order to *see* them properly and thus inevitably deploy state-like institutions as the vehicles to achieve those ends. Such a perspective resonates in other disciplines. For some political scientists or international relations theorists, the state and state-like institutions may become practical and metaphorical mechanisms for making sense of complex situations,[57] rendering them intelligible, an idealized and orderly arrangement of 'a world of concepts rendered suitable for practice'.[58] For sociologists, particularly sociologists of institutions (such as Mary Douglas and others), states and state-like institutions are particularly prone to developing and reproducing their own rationality, their own reason for being, conferring and fixing a 'sameness' shaped by the shared thought, values, and information within the institutions.[59] As Douglas has argued:

53 Brooks, op. cit., n. 5.
54 R. Rotberg (ed.), *State Failure and State Weakness in Time of Terror* (2004).
55 See, generally, M. Cherif Bassiouni (ed.), *Post-conflict Justice* (2002).
56 J. C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1999).
57 For example, J. Bartelson, *The Critique of the State* (2001).
58 P. Steinberger, *The Idea of the State* (2004) 13.
59 M. Douglas, *How Institutions Think* (1986) 53. See, also, M. Brinton and V. Nee, *The New Institutionalism in Sociology* (1998).

> the entrenchment of an institution is essentially an intellectual process as much as an economic and political one … [E]very kind of institution needs a formula that founds its rightness in reason and in nature.[60]

Since lawyers, policy makers, and state officials often appear to think of justice as belonging to the institutions which make up a justice system and the people who staff it,[61] state-like models of justice are thus prone to replication.

The attention to 'stateliness' in societies in transition is, however, more than a conceptual replication of legalistic formations. Of course, the achievement of a secure environment is the fundamental 'sine qua non' of post-conflict reconstruction.[62] Until recently (as is developed below), the provision of security in post-conflict societies was often viewed as synonymous with professionalizing the security capacity of state agencies such as the police. Even in contexts where the state has perpetrated extreme violence, such as Colombia, 'strengthening' the state is frequently proposed as a key element to conflict resolution. More broadly, however, as Fukuyama has argued, the reality is that in development work generally over the last decade there has been a much greater emphasis on the fact that 'institutions matter'.[63] The early zeal of post-Cold War economists who pressed for a smaller state and the 'will of the market' has given way to a much more overt acknowledgement of the centrality of the development of functioning (and indeed democratic) political institutions, public administration that can deliver basic goods and services, and a legal framework which is sufficiently robust to encourage investment, trade, and industry as well as more general public confidence in the state.[64] Institutional capacity enhancement is increasingly argued to be the necessary precursor to the liberalization of the political and economic systems of transitional societies. Such institutionalization typically requires a constitution, a constitutional court to interpret that constitution, a police force capable of enforcing the judgments of the court, and a legal system to regulate the market economy.[65] Developing the state's institutional capacity to deliver justice is thus viewed as a core element in the process of rebuilding structures of governance more generally.[66] It is both a

60 Douglas, id., p. 45
61 Christie, op. cit., n. 9.
62 J. Stromseth, D. Wippman, and R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006), especially ch. 5.
63 F. Fukuyama, *State Building: Governance and World Order in the 21st Century* (2004) 28.
64 See, for example, W. Easterly, *The Elusive Quest for Growth: Economists' Adventures and Misadeventures in the Tropics* (2001); N. van de Walle, *African Economies and the Politics of Permanent Crisis 1979–1999* (2001); World Bank, *Reforming Public Institutions and Strengthening Governance.* (2000).
65 See R. Paris, *At War's End: Rebuilding Peace After Civil Conflict* (2004) 205.
66 D. Brinkerhoff, 'Rebuilding Governance in Failed States and Post-Conflict Societies: Concepts and Cross Cutting Themes' (2005) 25 *Public Administration and Development* 3–14.

practical and symbolic necessity as well as a way of 'seeing' reconstruction.

The logic of developing state justice capacity at the national level or 'state-like' institutions at the international level to deal with international criminal justice would therefore seem unimpeachable. However, one of the reasons Scott suggests 'state-centric' grand schemes often fail spectacularly is that they oversimplify. They may fail to take sufficient account of local customs and practical knowledge and to engage properly with community and civil society structures. Such failures, often justified in the name of efficiency, professional expertise or simply 'getting the job done', may in turn lead to incompetence or maladministration and encourage grass-roots resistance to such state-led initiatives.[67] Once such institutions are created, the capacity for self-justification and self-replication which Douglas identifies obscures the need for thicker forms of accountability or legitimacy towards those whom such institutions claim to serve.[68] In particular, when actors within such institutions develop a self-image of serving higher goals such as 're-establishing the rule of law', the temptation to see victims or violence-affected communities as constituencies which must be managed rather than citizens to whom they must be accountable becomes all too real.

To summarize, there is a dialectic relationship between the dominance of legalism in much transitional justice discourse and the tendency to 'see' justice and justice delivery as quintessentially the business of state or 'state-like' institutions. Such a view is derived in part from an awareness of the complexities of the tasks being undertaken and the practical necessity for some form of institutional delivery mechanism in order to render such objectives legible. It is also a product of the self-replicating power of institutions and of the revitalization of the state as the key vehicle for the delivery of justice and security over the past decade or more. However, there are real dangers that the concentration of the stewardship of transitional justice in such institutions mitigates against developing lines of ownership and accountability to the communities they were designed to serve. This tendency towards 'seeing like a state', together with the particular seductive qualities of law in transition and the dominance of the human rights framework are the key limitations associated with legalism which hamper the theoretical understanding and practical work of contemporary transitional justice.

67 Scott, op. cit., n. 56.

68 See, generally, D. Beetham, *The Legitimation of Power* (1991). For an excellent discussion on thicker forms of accountability at community level, see D. Roche, *Accountability in Restorative Justice* (2003).

II. TOWARDS A THICKER UNDERSTANDING OF TRANSITIONAL JUSTICE

As noted above, the origins of this article lie partially with an academic frustration at such legalistic dominance but also in the practical consequences of that phenomenon. The argument here is that these variants of legalism can cumulatively disconnect individuals and communities from any sense of sovereignty over transitional justice.[69] Legalism contributes directly to a process which Paul Gready has well captured as the distinction between 'distant justice' and justice which is actually 'embedded' in communities which have been directly effected by violence and conflict.[70] The need for praxis demands that one do more than simply delineate and critique the dominance of legalism but actually offer some normative and practical correctives. In this part of the article I shall attempt to suggest ways in which some of these limitation may be overcome.

Again it is important to bear in mind that what is being postulated here is not a rejectionist approach to the role of law within transitional justice. Notwithstanding the criticisms outlined above, it is obvious, that, like institutions, law matters.[71] That said, what is being argued here is an attempt to 'thicken' the topic (for lawyers in particular) through the encouragement of legal humility, 'seeing' human rights as development and drawing upon some of the insights provided by criminology.

THE ENCOURAGEMENT OF LEGAL HUMILITY

Lawyers, like other professionals, have rarely been associated with a lack of self-regard.[72] The combination of the intellectual and technical demands of law, a traditionally elevated social status, the importance of the subject matter, the relatively closed social and professional worlds of lawyers, the peculiarities of legal education and models of professional self-governance, and a range of other factors can contribute to a sense of elitism and arrogance in the legal profession.[73] As was noted above, law's generic seductive

69 For a useful overview of the relationship between sovereignty and law, see Loughlin, op. cit., n. 16, especially ch. 9.

70 P. Gready, 'Reconceptualising Transitional Justice: Embedded and Distanced Justice' (2005) 5 *Conflict, Security and Development* 2–21.

71 For a provocative discussion on this issue, see J. Griffith, 'Is Law Important?' (1979) 54 *New York University Law Rev.* 342–74.

72 See M. Larson, 'On the Matter of Experts and Professionals, or How is It Possible to Leave Nothing Unsaid' in *The Formation of Professionals: Knowledge, State and Strategy*, eds. R. Torstendal and M. Burrage (1990).

73 See, generally, T. Johnson, *Professions and Power* (1972); K. MacDonald, *The Sociology of the Professions* (1995); J. Morison and P. Leith, *The Barrister's World and the Nature of Law* (1995); R. Abel, *English Lawyers: Between Market and State* (2003); F. Kay, 'Professionalism and Exclusionary Practices: Shifting the Terrain of

qualities are all the more pronounced in times of transition and thus the privileging of legal knowledge and the work of legal professionals becomes manifest. Such innate tendencies in the law profession, allied to the imperialist tendencies associated with even well-meaning international involvement in transitional contexts,[74] make the case for greater legal humility in such sites all the more pressing.

At an operational level, as was noted above, common sense dictates that lawyers will be embroiled in the day-to-day work of transitional justice. The drafting of new constitutions, the establishment of prosecutorial or truth recovery mechanisms, the reshaping of criminal justice systems, the release of political prisoners or the design of amnesties – these and other processes and products associated with transition are, of course, 'creatures of law'. However, there are ways in which lawyers can work in transitional contexts and yet be more honest about the limitations of legalism.[75]

For example, an international or local tribunal or a truth commission is self-evidently but one element of a broader transitional process and it should be constantly articulated as such, both in public utterances and in the working practices of the legal professionals involved. The 'overselling' of the capacity of major legal institutions to deliver forgiveness, reconciliation or other features associated with post-conflict nation-building may well encourage unrealizable public expectations and ultimately an unfair assessment that such institutions have 'failed'.[76] In addition the tendency of international lawyers to eulogize the glory and majesty of international law being 'brought to' previously war-torn regions often appears oblivious to the strong evidence of a disconnect between such imperious aims and their perception in the communities affected by such violence. In Sierra Leone, for example, despite considerable evidence of ambivalent and complex attitudes amongst ordinary Sierra Leoneans towards the Special Court, international lawyers have shown little reticence in speaking in grandiose

Privilege and Professional Monopoly' (2004) 11 *International J. of the Legal Profession* 11–20; K. McEvoy and R. Rebouche, 'Mobilising the Professions: Lawyers, Politics and the Collective Legal Conscience' in *Judges, Human Rights and Transition*, eds. J. Morison, K.McEvoy, and G. Anthony (2007).

74 See, generally, M. Ignatieff, *Empire Lite: Nation Building in Bosnia, Kosovo and Iraq* (2003); Paris, op. cit., n. 65; R. Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (2005).

75 For example, as one prominent human rights lawyer who was intimately involved in the processes of early release of prisoners in South Africa and later in Northern Ireland told the author, 'of course the law is important, but at the end of the day you have to remember that this is a political and not a legal process.' Interview with Brian Curran, see K. McEvoy, 'Prisoner Release and Conflict Resolution: International Lessons for Northern Ireland' (1998) 8 *International Criminal Justice Rev.* 33–61 for further discussion.

76 See Wilson, op. cit., n. 42; C. Moon, 'Prelapsarian State: Forgiveness and Reconciliation in Transitional Justice' (2004) 17 *International J. for the Semiotics of Law* 185–97.

terms 'on their behalf'.[77] In addition, the special tribunal was created as a result of an agreement between the UN and the local government. That agreement led to the indictment of senior members from three of the factions in the war including militia leader Sam Hinga Norman (who was Deputy Minister of Defence and the principal political rival to the incumbent president) but no key government actors including the President (who, as Minister for Defence during the war, was Hinga's boss) and Vice-president – omissions which have undermined some of the more grandiose claims with regard to the Court.[78] Similarly in Iraq, the Iraqi High Tribunal which was established to try Saddam Hussein was originally framed by some as 'justice for the Iraqi people' but that position has been significantly undermined by the actual conduct of the trial and macabre farce of his execution.[79] Lawyers would do well in such contexts to keep their discussions and analysis more measured and grounded in local realities.

Similarly, in the ubiquitous delivery of 'rule of law' and human rights related training and education in transitional justice settings, a more honest acknowledgement of the contingent, partial, and political history of such discourses is much more likely to resonate with those who have lived through conflict.[80] Indeed, I would contend such a critical and contextual

77 Extracts from the opening statement by American Prosecutor David Crane at the trial of former CDF militia leader Samuel Hinga Norman are illustrative:

> On this solemn occasion, mankind is once again assembled before an international tribunal to begin the sober and steady climb upwards towards the towering summit of justice … The rule of law marches out of the camps to the downtrodden onward under the banner of never again and no more … The light of this new day – today – and the many tomorrows ahead are a beginning of the end of the life of that beast of impunity, which howls in frustration and shrinks from the bright and shining light spectre of the law. The jackals whimper in their cages certain of their impending demise. The Law has returned to Sierra Leone and it stands with all Sierra Leoneans against those who seek their destruction.

(3 June 2004, Trials of Samuel Hinga Norman, Moinana Fofana, Allieu Kondewa, Case No. SCSL-030140I.) For a review of public opinion on these and other cases, see E. Sawyer and T. Kelsall, 'Truth Vs Justice: Popular Views on the Truth and Reconciliation Commission and the Special Court of Sierra Leone' (2007) 7 *Online J. of Peace and Conflict Resolution* 36–68.

78 See T. Kelsall, 'Politics, Anti-politics, International Justice: Language and Power in the Special Court for Sierra Leone' (2006) 32 *Rev. of International Studies* 587–602.

79 Although the tribunal was staffed by Iraqi judiciary, it was heavily influenced by the US Department of Justice Regime Crimes Liaison Office which was involved in selecting and training the judges, drafting the relevant statute, and assisting the tribunal throughout its deliberations. For an interesting debate on the format of the tribunal, see C. Doebbler and M. Scharf, 'Will Saddam Hussein get a Fair Trial?' (2005–2006) 37(6) *Case Western Reserve J. of International Law* 21–40. See Amnesty International press release, 'Amnesty International Deplores Execution of Saddam Hussein' (30 December 2006), which describes the trial as 'a deeply flawed process' and 'being seen by many as little more than victors' justice.' AI Index: MDE 14/043/2006 <http://www.amnesty.org>.

80 For useful critical discussion, see T. Carothers, 'The Rule of Law Revival' (1998) 77(2) *Foreign Affairs* 95–106; D. Sharp, 'Prosecutions, Development, and

approach to the 'law in action rather than the law in books' is more likely to assist in the embedding of such frameworks in transitional contexts (precisely because it appears real, grounded, and even 'flawed') rather than a positivistic reiteration of international standards in the 'law, is the law, is law' style adopted by some more traditional lawyers. The historical fallibility of 'the rule of law' is not necessarily a fundamental weakness in education or training. Rather, I would argue that it is an entry point for an engaged discussion about the importance of the ideal as a bedrock for a transforming society.[81]

Legal institutions associated with transitional justice can and should operate most effectively if they run in conjunction with properly managed, effective, and accountable local or indigenous processes which comply with basic international human rights standards. Indeed, the UN has in recent years acknowledged the notion that the rule of law in transitional contexts should embrace precisely such a willingness to ally international norms with 'respect' for local ownership, values, and traditions.[82] With such a mindset, lawyers could ideally establish the broad legal parameters within which aspects of the transition should be framed but the 'filling in' of the transitional process on the ground should as much as possible be left to local political, community, and civil society structures. Peacemaking circles in South Africa and community based restorative justice programmes in Northern Ireland are evidence that properly resourced and managed local community structures are capable of engagement in and direction of transitional justice processes. Again, to paraphrase Nils Christie, a more humble approach to transitional justice thus requires a 'ceding of ownership' by the legal professionals involved towards such structures.[83]

HUMAN RIGHTS AS DEVELOPMENT

The reluctance of lawyers to relinquish control in many contexts, but in particular in transitional societies, is often expressed explicitly in terms of the human rights framework. It is as though a top-down and state-centric

Justice: The Trial of Hissein Habré' (2003) 16 *Harvard Human Rights Law Rev.* 147–78.

81 See Stromseth et al., op. cit., n. 62, especially ch. 8. Certainly the author's own experience in doing human rights training and education with ex-combatants in Northern Ireland would strongly suggest that such a style of delivery is more readily received and arguably much more likely to be genuinely internalized into the actual practice of the participants than a more traditional doctrinal exposition of the relevant international standards. For a discussion on different styles of human rights education and training, see F. Tibbits, 'Understanding What We Do: Emerging Models for Human Rights Education' (2002) 48(3) *International Review of Education* 159–71.

82 UN Secretary-General, op. cit., n. 1, at p. 17.

83 Christie, op. cit., n. 9.

ownership over human rights was the *sole* guarantor of the rights of those involved in the process of transition. I would argue, however, that there is an alternative perspective on rights discourses which offers a potentially more fruitful pathway to embedding rights discourses in communities affected by violence.

Many of the critiques of human rights discourses outlined above are drawn from the sociological, anthropological, and socio-legal writings on the subject. In seeking to address these various criticisms in transitional settings, debates on human rights within the development literature have also become increasingly relevant.[84] Such a pull is perhaps inevitable. In conducting research on transitional justice in settings such as Sierra Leone, for example, one cannot but be struck by the stark juxtaposition between the gleaming edifices of international justice such as the Special Court and the bleak poverty in which they are physically situated.[85] The literature on human rights and development is rich, and doing justice to its complexity is well beyond the confines of this paper. However, what resonates in particular for current purposes is the notion, increasingly prevalent in development circles, that human rights can provide a practical and normative basis for grass-roots justice work in communities which have been affected by conflict and violence. If, as Sen has argued, we regard 'development' as essentially the expansion of human freedoms[86] – freedoms which are embodied in the relevant international instruments on traditional civil and political rights as well as those which focus upon economic, social, and cultural rights (access to health care, education, shelter, work, and food) – then the relationship between rights and development is a symbiotic one. Development is required to expand those human freedoms; it is necessary to make rights *realizable*.

This explicit linkage between human rights and development has moved centre-stage in the language, at least, of a range of international institutions in the past decade or so. A major shake-up occurred at the United Nations following the pitiful response to the unfolding tragedy in Rwanda.[87] All of the agencies of the UN involved in development and humanitarian relief have increasingly placed human rights to the fore in discussing their work.[88]

84 See, for example, J. Häusermann, *A Human Rights Approach To Development* (1998); P. Uvin, *Human Rights and Development* (2004); P. Alston and M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (2005); P. Gready and J. Ensor, *Reinventing Development?: Translating Rights-based Approaches from Theory into Practice* (2005); B. Andreassen and S. Marks (eds.), *Development as a Human Right: Legal, Political, and Economic Dimensions* (2007).

85 See, also, J. Cockayne, 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals' (2005) 28 *Fordham International Law J.* 616–80.

86 A. Sen, *Development as Freedom* (2001).

87 T. Howland, 'Mirage, Magic or Mixed Bag? The United Nations High Commissioner for Human Rights Field Operation in Rwanda' (1999) 21 *Human Rights Q.* 1–55.

88 See *Renewing the United Nations: A Programme for Reform*, UN Doc. A/51/950, July 1997.

In 1998, the World Bank, while acknowledging that it has historically been 'less forthcoming about articulating its role in promoting human rights within the countries in which it operates', declared its core belief that 'creating the conditions for the attainment of human rights is a central and irreducible goal of development'.[89] Similarly, a range of important national donors such as the United Kingdom's Department for International Development have described strategies for reaching international development targets as 'realising human rights for poor people'.[90] In addition, many major international humanitarian agencies such as Oxfam, Save the Children, CARE, and others have mainstreamed human rights across their policy and delivery programmes.[91]

Many of the documents and publications produced by these major international institutions and agencies are replete with frameworks, benchmarks, and practical mechanisms designed to guide both these agencies themselves and their local 'partners' in embedding rights discourses in their work.[92] The emphasis has shifted from a welfarist approach to people 'because they have needs' to one which provides assistance 'because they have rights', that is, entitlements which give rise to legal obligations on the part of others including the state, donors, and aid agencies themselves.[93] Thus mission statements, strategic objectives, evaluation reports, and the like now often address familiar development themes such as accountability, transparency, non-discrimination legitimacy, partnership, empowerment, and so on explicitly by reference to international human rights standards. Human rights are emerging as the key benchmarks against which to measure not just the effectiveness or 'outputs' of development but its practical and epistemological starting point, the breadth of its gaze, and the process through which it is planned and delivered. As well as the international actors involved in development work, one also sees increased articulation of environmental justice, participation, information, ownership over natural resources, and so forth expressed as 'rights' by indigenous development groups on the ground.

89 World Bank, *Human Rights and Development: The Role of the World Bank* (1998), available at <http://www.worldbank.org/html/extdr/rights/hrtext.pdf>.

90 Department for International Development, *Realising Human Rights for Poor People: Strategies for Achieving International Development Targets* (2000).

91 See, for example, CARE International, *A Rights Approach and Causal-Responsibility Analysis* (updated March 2002); Oxfam GB, *Development and Rights* (1998); Save the Children, *Child Rights Programming: Child Rights-Based Approach To Programmes Summary* (2003).

92 See, for example, M. Picard, *Measurement and Methodological Challenge to Care International's Rights Based Programming* (2003), available at <http://www.enterprise-impact.org.uk/pdf/Picard.pdf>. R. Eyben, C. Ferguson, and L. Groves, 'How Can Donors Become More Accountable To Poor People?' in *Inclusive Aid: Power and Relationships in International Development*, eds. L. Groves and R. Hinton (2004).

93 See Institute of Development Studies, *The Rise of Rights: Rights Based Approaches to International Development* (2003).

Of course the outworking of such a relatively new fusion of discourses is inevitably contested. From some commentators, the adoption of 'human rights talk' is viewed as cynically as the 'Emperor's new clothes', fashionable buzzwords which dress up familiar imperialist and other flaws in the same old development work.[94] Uneven power relationships, cultures of dependency, chronic mismanagement, and other faultlines in relations between international donors and local agencies persist.[95] Organizations at all levels continue to be involved in unedifying competition for 'a market share in money and misery'.[96] Some international and local actors inappropriately stretch the language of rights to such an extent that the legal integrity of the rights discourse begins to fray.[97] Of course the continued controversy persists over the application of human rights discourses to non-state actors and who precisely can and cannot be held accountable by such standards.[98] These and many other features underline inevitable tensions between rights and development.

Such perfectly reasonable caveats aside, human rights discourses in the hands of suitably skilled grass-roots organizations still offer a compelling corrective to legalistic understandings of the field. Imbuing rights discourses with what Nyamu-Musembi has referred to as 'an actor-orientated perspective on human rights' – a perspective she describes as exploring how legal principles play out in terms of their concrete effects in social settings from the viewpoint of traditionally subordinated actors[99] – creates the space to challenge power differentials and underpin the *resistant* potential of rights discourses for such individuals and communities. Rajagopal, while sharing some of the critiques advanced earlier concerning human rights, also notes how human rights has emerged as an organizing framework for variants of 'third world resistance' which span a host of popular movements including peasant, urban, ecological, feminist, and others – well beyond the historically lawyer driven 'human rights movement'.[100] In post-conflict societies in particular, properly resourced and translated grass-roots rights talk and

94 See Uvin, op. cit., n. 84 for a review of this debate.

95 See, for example, M. Maren, *The Road to Hell: The Ravaging Effects of Foreign Aid and International Charity* (2002); W. Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (2002).

96 Ignatieff, op. cit., n. 74, at p. 98.

97 For example, the utilization by Oxfam of the 'right to be heard' or the frequent exhortation in some community and educational publications of the right of elders or teachers to 'respect' would undoubtedly make even the most relaxed of lawyers wince a little as they searched for a relevant international standard. See Institute of Development Studies, op. cit., n. 93.

98 See P. Alston (ed.), *Non-State Actors and Human Rights* (2005).

99 C. Nyamu-Musembi, *Towards an actor-informed perspective on human rights* IDS Working Paper 169 (2002).

100 B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2004) especially ch. 7.

action has the capacity to inspire, to mobilize, and to restore a sense of agency to the powerless.[101]

By way of example, I have written elsewhere about the embedding of human rights discourses in the work of the community-based restorative justice programmes in Northern Ireland. In those projects international standards were adapted, translated into locally understandable language, and became the benchmarks for the delivery of services in these conflict-affected communities.[102] It is precisely because of the politically fraught context in which these programmes have operated, as John Braithwaite has argued, that this jurisdiction has seen perhaps the most mature debate on restorative justice standards anywhere the world.[103] While the state has arguably sought to use the human rights framework in order to *control* these projects, the debate has been constantly nuanced and indeed 'thickened' by the practical experiences of community-based practitioners (many of them ex-combatants) and the people in local communities with whom they are working rather than by lawyers or state officials.[104] In such contexts, human rights do not offer pat answers to complex problems. Providing that the integrity of the discourse is maintained, they do provide a disciplined framework for what Habermas has described as the potential for 'communicative action'[105] – a space where a dialogue about competing rights claims can occur, where power relationships can be named, and where the needs of the state (even when expressed in human rights terms) do not necessarily trump the needs of individuals and communities most affected by violence.

101 A. Cornwall and C. Nyamu-Musembi, 'Putting the "Rights-Based Approach" to Development into Perspective' (2004) 25 *Third World Q.* 1415–37.

102 K. McEvoy and A. Eriksson, 'Restorative Justice in Transition: Ownership, Leadership and "Bottom Up" Human Rights' in *Handbook of Restorative Justice*, eds. D. Sullivan and L. Tift (2006).

103 J. Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 *Brit. J. of Crim.* 563–77.

104 For example, protocols currently under consideration which are designed to regulate the relationship between these community programmes and the criminal justice system are insistent about involvement in the police and prosecution service 'in order to ensure that rights are protected'. The retort from some of the community programmes has been framed in terms of the 'rights' of victims to determine the level and nature of the involvement of state agencies in addressing *their* harms. See K. McEvoy and A. Eriksson, 'Justice, Community and the State in Transition in Northern Ireland' in *Justice, Community and Civil Society: A Contested Terrain*, ed. J. Shapland (2007).

105 J. Habermas, *The Theory of Communicative Action: Reason and the Rationalisation of Society* (1981) 1, 8–15.

DEVELOPING A CRIMINOLOGICAL UNDERSTANDING OF TRANSITIONAL JUSTICE

The final theme I would suggest for transcending some of the legalistic traits associated with transitional justice which are explored above is an approach which draws from criminology in particular. Posner and Vermeule have argued that transitional justice is much more like ordinary justice than many of its advocates would acknowledge.[106] Certainly I would agree that criminological understandings historically derived from 'normal' societies are of relevance. Criminology has been famously described by David Downes as a 'rendezvous discipline'. It is a subject where other disciplines meet and its liveliness (at its best) is precisely because it is located on the busy crossroads of sociology, psychology, law, and philosophy. By virtue of its interdisciplinarity, and the rigour of its better scholarship, I would argue that criminology brings a number of attributes to the table which can assist in developing a 'thicker' understanding of transitional justice. In particular, criminology provides a helpful framework in asking practical questions about judging whether transitional justice *works* as well as more philosophical questions as to whom and what it is *for*. A fully theorized criminology of transition is beyond the scope of the current paper, but a number of pointers are useful for illustrative purposes.

The most obvious place to begin is with the notion of crime itself. Transitional justice has emerged in large part as a result of attempts to deal with the crimes of past regimes. Criminology has obviously a long tradition in seeking to understand better the aetiology of crime and the ways in which crime is a socially and politically constructed phenomenon. Over the last decade in particular, these analytical traditions have been deployed in conflict and post-conflict settings in exploring the most serious of 'political' crimes including genocide.[107]

Of course criminologists are not just interested in crime: they are also interested in justice. Thus criminological writing on transitions has focused on issues such as the delivery of justice and security by national criminal justice systems, the efficacy of local and international policing, the particular durability of informal styles of justice delivery, and a host of other theoretical and practical concerns about the relevance and utility of the discipline in understanding and seeking to resolve conflict.[108] Given the

106 E. Posner and A. Vermeule, 'Transitional Justice as Ordinary Justice' (2003) 117 *Harvard Law Rev.* 761–825.

107 See, for example, S. Cohen, 'Crime and Politics: Spot the Difference' (1996) 47 *Brit. J. of Sociology* 1–21; R. Jamieson, 'Genocide and the Social Production of Immorality' (1999) 3 *Theoretical Crim.* 131–46; J. Hagan, W. Rymond-Richmond, and P. Parker, 'The Criminology of Genocide: The Death and Rape of Darfur' (2005) 43 *Criminology* 525–62.

108 See D. Bayley, *Developing Democratic Policing Abroad* (2006); A. Snodgrass Godoy, *Popular Injustice: Violence, Community, and Law in Latin America* (2006);

emphasis on state-centricity in transitional contexts discussed above, perhaps of central relevance for this paper is the criminological approach to the state.

With regard to the state and justice ownership and delivery, criminologists have developed quite an advanced theoretical position.[109] Indeed the fragmentation of the state in the delivery of aspects of justice, security, policing, punishment, and so forth is now largely taken as a given by most contemporary criminologists. As Garland and Sparks argue, criminologist of all stripes have for some time been thinking well 'beyond the state' in their analysis of crime and justice.[110] In particular, for those who have been influenced by the writings of Foucault on governmentality, the 'hollowed out state' is now no longer perceived as the sole provider of such services but, rather, as a partner doing business with a range of other actors. The state is recast, to use Nikolas Rose's phrase, as 'exercising only limited powers of its own, steering and regulating rather than rowing and providing'.[111]

For example, in policing, intelligence, and security work, there is now a considerable ceding of authority and resources *above and beyond* the nation state. Authority is ceded to 'outside' major powers such as the United States. American police agencies have a long history of involvement in anti-drugs strategies in Latin America and more recently have become highly active in anti-terrorist policing in a wide range of countries. Authority also moves to supra-state policing structure such as Interpol and Europol or to the rapidly expanding supra-national private sector entities involved in the provision of security in both 'settled' and transitional contexts.[112] In addition, the developments in many jurisdictions of justice provision *alongside* the state through private prisons, private security, and private immigration services has seen the state become a contracting and regulating party which sets parameters within which non-state corporate actors are supposed to deliver a required service for an agreed fee.[113] Finally, many industrialized countries have been divesting justice responsibilities *below* the state to local community, voluntary, and civil society organizations involved in crime prevention, restorative justice, ex-offender management and reintegration,

A. Wardak, 'Building a Post-war Justice System in Afghanistan' (2004) 41 *Crime, Law and Social Change* 319–41; K. McEvoy and T. Newburn (eds.), *Criminology, Conflict Resolution and Restorative Justice* (2003); V. Ruggiero, 'Criminalizing War: Criminology as Ceasefire' (2005) 14 *Social & Legal Studies* 239–57.

109 See, especially, I. Loader and N. Walker, *Civilizing Security* (2007).

110 D. Garland and R. Sparks, 'Criminology, Social Theory and the Challenge of Our Times' in *Criminology and Social Theory*, eds. D. Garland and R. Sparks (2000) 5.

111 N. Rose, 'Government and Control' in Garland and Sparks, id., at p. 186.

112 See, for example, J. Sheptycki, *Issues in Transnational Policing* (2000); C. O'Reilly and G. Ellison, 'Eye Spy Private High': Re-Conceptualizing High Policing Theory' (2006) 46 *Brit. J of Crim.* 641–60.

113 See, for example, C. Logan, *Private Prisons: Pros and Cons* (1990); I. Loader, 'Thinking Normatively About Private Security' (1997) 24 *J. of Law and Society* 377–94; G. Lahav, 'Immigration and the State: The Devolution and Privatisation of Immigration Control in the EU' (1998) 24 *J. of Ethnic and Migration Studies* 675–94.

youth justice, and other activities.[114] In effect, the idealized state with its monolithic ownership over justice functions which is 'imagined' in many of the state-centric transitional justice discourses and evidenced in the massive expenditure on 'rule of law programmes' does not exist in much of the developed world.[115]

The difficulties of holding accountable these various private sector actors which operate above and alongside the state are well rehearsed in the criminological literature on transitional settings such as South Africa and Iraq.[116] However, what is of particular interest is the ways in which this 'imagined state' is perhaps most prescient with regard to the apparent difficulty of delegating *downwards* justice functions to local community and civil society structures in times of transition. As was discussed above with regard to Northern Ireland, the debate concerning community-based restorative justice has provoked quite a heated political tussle. In South Africa, despite the intuitive sympathy of many in the ANC particularly in the early days of the transition, there has been an at times uneasy relationship between the formal justice system and community-based justice and peacemaking initiatives.[117] Similarly, in the context of Rwanda, some of the legalistic criticisms levelled at the admittedly imperfect system of Gacaca (the adaptation of local indigenous traditions by the national government to process lower-level perpetrators of genocide) have been entirely disproportionate given the scale of the outrages that were being dealt with and the limited alternatives on offer.[118] Indeed, arguably one of the most compelling criticisms of the Gacaca system is precisely the high level of state ownership and control over the process and the concurrent lack of community autonomy.[119]

Contemporary criminology is in no way immune to the dangers of

114 See, for example, A. Crawford, *The Local Governance of Crime: Appeals to Community and Partnership* (1999); G. Bazemore and M. Schiff, *Restorative Community Justice: Repairing Harm and Transforming Communities* (2001); G. Hughes, *The Politics of Crime and Community* (2006).

115 There is an interesting parallel here with the symbolic importance of the police and other justice functions in the historical forging of a 'national identity' of the a number of European nations in the nineteenth century. See, for example, C. Elmsley, *Gendarmes and the State in Nineteenth-Century Europe* (2000).

116 B. Baker, 'Living With Non-State Policing in South Africa: The Issues and Dilemmas' (2002) 40 *J. of Modern African Studies* 29–54; R. Jamieson and K. McEvoy, 'State Crime by Proxy and Juridical Othering' (2005) 45 *Brit. J. of Crim.* 504–27.

117 See Roche, op. cit., n. 68.

118 For measured reviews of some of these criticisms, see E. Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda' (2002) 34 *New York University J. of International Law and Politics* 355–96; M. Drumbl, 'Restorative Justice and Collective Responsibility: Lessons For and From the Rwandan Genocide' (2002) 5 *Contemporary Justice Rev.* 5–22; W. Schabas, 'Genocide Trials and Gacaca Courts' (2005) 3 *J. of International Crim. Justice* 879–95.

119 L. Waldorf, 'Rwanda's Failing Experiment in Restorative Justice' in Sullivan and Tift, op. cit., n. 102.

vigilantism, exclusionary communitarianism, reification of unequal gender or other power–relationships, and the related potential failings in ceding justice ownership to local communities. In fact, as Goldsmith has suggested, those dangers are undoubtedly significantly enhanced in transitional settings with weak or flawed states and an abundance of Kalashnikovs.[120] I have argued elsewhere that it is criminology which provides the least dewy eyed and the most critically informed appreciation of the difficulties of 'doing' justice in such community settings.[121] However, what distinguishes modern criminology from much legal scholarship on the topic, both in settled and transitional justice settings, is that it appears more willing to *try* to take on the challenges of informal or community justice. Unlike many lawyers whose default position is the tried and failed methods of legal formalism, more considered criminology by and large does not set expectations from state justice that cannot be delivered.[122]

It is this pronounced weariness in the capacity of traditional state institutions to actually *deliver* justice that underpins much of the practical contribution of criminology to the transitional justice debate. Amongst the key themes that a first-year undergraduate criminology student is required to unpick is what is referred to as the 'attrition rate' in criminal statistics. This refers to the number of crimes actually committed and the number which ultimately result in a successful prosecution. The figure for the United Kingdom, which is fairly typical of most advanced industrial societies, is that approximately 3–4 per cent of crimes result in a successful prosecution.[123] This disparity, which the Home Office itself refers to as the 'justice gap', occurs in a context where expenditure on criminal justice in England and Wales will top £22.7 billion in 2007/8, or 2.5 per cent of gross domestic product.[124] In short, it is little wonder that many criminologists pose the fundamental question whether the traditional state-centred justice system is actually 'fit for purpose'. This is precisely why so much criminological emphasis in recent years has been focused upon an ever greater technical refinement of 'what works' in criminal justice practice.[125] It also explains

120 A. Goldsmith, 'Policing Weak States: Citizen Safety and State Responsibility' (2005) 13 *Policing and Society* 3–21.

121 See, for example, M. Cain, 'Beyond Informal Justice' (1985) 9 *Contemporary Crises* 335–73; R. Matthews (ed.), *Informal Justice* (1988); McEvoy and Mika, op. cit., n. 7.

122 For classic accounts of the socio-legal scholarship in this field, see R. Abel (ed.), *The Politics of Informal Justice* (Vol. 1, *The American Experience*, Vol. 2, *Comparative Studies*) (1982) and S. Merry and N. Milner (eds.), *The Possibility of Popular Justice* (1993).

123 See R. Garside, *Crime, Persistent Offenders and the Justice Gap* (2004).

124 E. Solomon, C. Eades, R. Garside, and M. Rutherford, *Ten Years of Criminal Justice Under Labour; An Independent Audit* (2007) 10.

125 See, for example, S. Farrell, *Rethinking What Works with Offenders: Probation, Social Context and Desistance from Crime* (2004); D. Bayley (ed.), *What Works in Policing?* (1998).

the rapid development of restorative justice initiatives in particular, as governments, policy communities, and academics increasingly appear to have concluded that much traditional criminal justice practice 'wasn't working' and wasn't providing value for money.[126]

Such a critical approach to the practical effectiveness of state justice has potentially profound implications for transitional justice at the national level. As noted above, national criminal justice systems in transition have received significant investment through numerous 'rule of law programmes' designed to improve criminal justice systems previously characterized by brutality, inefficiency, and corruption.[127] The *need* for better policing, an impartial judiciary, better prisons, and so forth in such contexts is indisputable. However, the reality from the experience of the developed world suggests that even in the unlikely event that such justice systems could eventually be 'raised' to the performance levels of their Western counterparts, they would still most likely fall far short of the mark. This note of realism needs to be injected into these programmes. There is little point in promoting an ideal of state justice that does not work in the better resourced context of the developed world where 'rule of law' norms have (arguably) had much longer to become embedded in the political and social fabric. At the very least, such programmes need to be alive to the possibility of justice capacity existing elsewhere and be willing to deploy resources to skill up potential civil society, community or even private sector partners. They need to be willing to try to transform centralizing and monopolizing organizational cultures in state agencies, and to put in place structures to ensure that partnership arrangements are properly regulated. Such relationships, referred to by Clifford Shearing and his colleagues as 'nodal forms of governance',[128] will inevitably be required for more effective justice delivery. 'Seeing' like a state in such contexts may well result in failure and disillusionment.

The final significant criminological contributions are to ask *whom* and *what* is transitional justice for.[129] Such questions are particularly pertinent to the international tribunals because they appear to have the least well developed answers.[130] Typically the legalistic responses to such questions are framed in terms of 'bringing justice to victims' or 'holding offenders accountable'.[131] There appears little cognisance here of the complex array of victims' needs beyond the *punishment* of perpetrators. These needs are well

126 G. Johnstone, *Restorative Justice: Ideas, Values, Debates* (2002).

127 Brooks, op. cit., n. 5.

128 See L. Johnston and C. Shearing, *Governing Security: Explorations of Policing and Justice* (2002); J. Wood and C. Shearing, *Imagining Security* (2007).

129 These questions will be more fully developed elsewhere. See McEvoy et al., op. cit., n. 10.

130 Roberts and McMillan, op. cit., n. 6; M. Drumbl, 'Toward a Criminology of International Crime' (2003) 19 *Ohio State J. on Dispute Resolution* 263–82.

131 See P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *Am. J. of International Law* 7–31.

rehearsed not only in criminology, victimology, and restorative justice but also in the transitional literature itself which has emerged from the experiences of truth recovery, memorialization, and other strategies for dealing with the past.[132] Although victim/witness protection, counselling, and other protective measures have been put in place by the various tribunals, suspicions remain that an instrumentalist attitude towards victims as primarily a means to achieve a successful prosecution persist.[133]

Similarly, the unashamed emphasis in international criminal justice is upon retribution as a means of holding senior perpetrators, planners or instigators accountable for previous atrocities.[134] Punishment is linked casually with the assertion that it will serve as a deterrent to other would-be perpetrators of genocide or other gross violations.[135] Again this logic takes little apparent account of the criminological literature which asks serious questions of deterrence theory generally never mind in the particular social, political or cultural circumstances which lead to genocide.[136] Such a focus also fails to capture the much richer notions of deliberative accountability developed within restorative justice circles[137] or indeed the ways in which a focus on *individual* responsibility fails take proper account of the complex *collective* factors which contribute to violence.[138] In declaring a relatively

132 See J. Goodey, *Victims and Victimology: Research, Policy and Practice* (2005); H. Strang, *Repair or Revenge: Victims and Restorative Justice* (2003); B. Hamber, D. Nageng, and G. O'Malley, 'Telling it like it is … Survivors' perceptions of the Truth and Reconciliation Commission' (2000) 26 *Psychology in Society* 18–42.

133 See S. Garkawe, 'The Victim Related Provisions of the Statute of the International Court: A Victimological Analysis' (2001) 8 *International Rev. of Victimology* 269–89; B. Nowrojee, '*Your Justice is Too Slow': Will the ICTR Fail Rwanda's Rape Victims?* (2005).

134 The phrase used in Article 1 of the Statute for the Special Court in Sierra Leone is that that the court has 'the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law', available at <http://www.sc-sl.org/scsl-statute.html>.

135 Interestingly, the Rome Statute which governs the International Criminal Court has virtually nothing to say about the purpose of sentencing other than the rather vague formulation in the preamble that the ending of impunity for serious international crimes will 'contribute to the prevention of such crimes'. As Schabas points out, it suggests that the question about purpose is so obvious 'as to require no comment or direction.' W. Schabas, *An Introduction to the International Criminal Court* (2004) 163.

136 For example, the review of the deterrence literature conducted by Von Hirsh et al. concluded that 'the studies reviewed did not provide any basis for inferring that increased severity of sentence had any deterrent effect' and was inconclusive as to whether certainty of punishment was any more effective. A. Von Hirsch, A. Bottoms, E. Burney, and P.O. Wiklstrom, *Criminal Deterrence and Sentence Severity* (1999).

137 Roche, op. cit., n. 69.

138 As Luban has argued, 'getting people to murder and torment their neighbours is not hard; in some ways, it turns out to be ridiculously easy.' D. Luban, 'Interventions and Civilization: Some Unhappy Lessons of the Kosovo War' in *Global Justice and Transnational Politics*, eds. P. De Greiff and C. Cronin (2002) 107.

small number of individuals officially guilty, we also run the risk of creating many more 'false innocents'.[139]

In broad terms there is a rich potential for a criminological contribution to transitional justice at the theoretical and practical level. Criminology, or at least good criminology, has a sophisticated theory of the state and other actors involved in justice work. Its practical bent provides a framework for the assessment of capacity, measurability, efficacy, and value for money in each of these contexts. Its philosophical and moral curiosity asks the right questions about whom and what transitional justice is actually for. Finally, its interdisciplinary origins afford it breadth and depth. And, given that law is one of the disciplines which has been key to the intellectual development of the subject, it is a discipline that is (mostly) less than 'awed' by the seductive certainties of legal analysis.

CONCLUSION

Although, as Bell et al. have argued, transitional justice discourses are themselves still 'in transition',[140] the centrality of 'the rule of law' is now firmly entrenched as a central pillar in the broader architecture of transition from conflict.[141] Perceived initially as a sub-discipline of international law, transitional justice arguably cloistered a peculiarly durable variant of legalism, precisely because the area was so self-evidently political. In re-reading some of the texts on legal developments in the field,[142] one gets the impression that lawyers are struggling against the obvious contingency of political expediency, rightly wary of 'pragmatic' deals being struck with outgoing regimes and holding firm to the safe ground of international human rights standards. In such a context the need for staying firmly fixed on legal principles was self-evident.

However, the transitions from the authoritarian rule of the 1970s with its blanket amnesties and crude efforts to obliterate the past are much less legally or politically viable.[143] In Latin America in particular, many of the most obnoxious of these accommodations have been steadily whittled away by the Inter-American Court or national courts seemingly becoming more confident that democracy has taken a firm hold. More broadly, there is now a solid bedrock of international criminal law. There are binding international

139 H. Steinert, 'Fin De Siècle Criminology' (1997) 1 *Theoretical Criminology* 111–29.
140 id., p. 306
141 See G. O'Donnell, 'Why the Rule of Law Matters' (2004) 15(4) *J. of Democracy* 32–46.
142 See, for example, A. Cassesse, *International Criminal Law* (2002) and W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslava, Rwanda and Sierra Leone* (2006).
143 L. Mallinder, 'Can Amnesties and International Justice be Reconciled?' (2007) 1 *International J. of Transitional Justice* 208–30.

standards and a range of case-law across the transitional field in the most contentious of areas including what is permissible in local amnesty laws. The myriad of tribunals and the International Criminal Court are all operational. A sophisticated body of knowledge exists about how truth recovery should and should not be effected.

'Letting go' of legalism does not require abandoning these advances. Rather it entails building upon them. It suggests a more honest acknowledgment of the limitations of legal thinking and practice which aren't properly grounded in the 'real world' in which law operates in places like Rwanda, Colombia, or Sierra Leone.[144] It contemplates a greater willingness to give space to actors other than the state or 'state-like' institutions in justice provision. It means being open to the insights of disciplines and forms of knowledge other than law in better understanding the meaning of justice in a transition. A thicker variant of transitional justice will be also better equipped to actually *deliver* to those who have been most affected by conflict.

144 See R. Mani, *Beyond Retribution: Seeking Justice in the Shadow of War* (2002).